**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION TWO**

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| TECHNICAL OPERATIONS INC., et al.,<br><br>and<br><br>THEATRICAL PROTECTIVE UNION, LOCAL NO. ONE, IATSE, AFL-CIO. | Case No.: 02-RC-235693 |

**MORGAN STANLEY'S MOTION TO FILE POST-HEARING BRIEFS**

Respondent Morgan Stanley & Co. LLC ("Morgan Stanley") seeks special permission of the Regional Director to file post-hearing briefs in the above matter. In support, Morgan Stanley states as follows:

1. The evidence presented at the hearing demonstrates the presence of complex joint-employer issues in this matter. This requires the Region to conduct a detailed application of the facts to a fact-intensive, multi-factor joint-employer standard that is evolving rapidly. Briefing these issues would greatly assist the Region in evaluating and determining the matters involved in this case.

2. The Board's joint-employer doctrine is in a state of flux pending finalization of proposed rules published September 14, 2018. *See* 83 FR 46661, 46681-46697. As brief background to this unsettled area of law:

    - For more than 30 years, joint-employment required a showing that two separate entities share or codetermine "those matters governing the essential terms and conditions of employment" and that "the [alleged joint-employer] meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction." *See Laerco Transp. & Warehouse*, 269 N.L.R.B. 324 (1984). Under this standard a "joint-employer's control over these matters [must] be direct

and immediate." *TLI, Inc.*, 271 NLRB 798 (1984), *enf'd*, 772 F.2d 894 (3rd Cir. 1985).

- In 2015, the Board adopted a two-part standard which evaluated: (1) whether a common-law employment relationship exists; and (2) whether the putative joint-employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining." *Browning-Ferris*, 362 NLRB No. 186 (2015).

- The new standard had a tenure of only two years before the Board rejected it in *Hy-Brand*, 365 NLRB No. 156 (2017).

- *Hy-Brand* itself was later set aside due to procedural issues unrelated to the merits of the decision.

- The Board subsequently published the aforementioned proposed rules in September 2018, pursuant to which an employer may be considered a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. 83 FR at 46681-46697. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship. *Id.*

- While the proposed rule was pending final approval, the U.S. Circuit Court of Appeals for the D.C. Circuit issued a decision partially upholding *Browning-Ferris* while reversing the Board's articulation and application of the indirect-control element. *See Browning-Ferris Industries of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018).

The Board has not yet published its final rule. This remains a complex and developing area of law requiring further briefing to the Region.

3. Without a post-hearing brief, Morgan Stanley would be deprived of the time necessary to argue both the legal and factual issues presented by a lengthy and complex record and evolving legal standard. Denying Morgan Stanley the opportunity to file a post-hearing brief would unfairly prejudice: (a) Morgan Stanley's interests, (b) employees' interests, and (c) the Region's ability to fulfil its duty to fairly and comprehensively consider these complex issues and issue a decision supported by the record and the law.

4. Prior to submitting this motion, Morgan Stanley solicited the approval of both the other parties to this matter, Technical Operations, Inc. ("Tech Ops"), and Petitioner IATSE Local 1 ("Petitioner"). Counsel for Tech Ops communicated to me that Tech Ops consents to and supports this motion. As of the time of filing this motion, I had not heard from Petitioner as to its position.

5. At the close of the first day of hearing on February 22, 2019, all parties stated that they expect the hearing in this matter to close on February 27, 209. In light of the foregoing points and authorities, Morgan Stanley requests a period of two weeks in which to file post-hearing briefs in this matter, resulting in a due date of March 13, 2019.

WHEREFORE, Morgan Stanley respectfully requests that the Region grant the parties special permission to file post-hearing briefs in this matter no later than March 13, 2019.

Dated: February 26, 2019
New York, New York

OGLETREE, DEAKINS, NASH,
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